United States Court of Appeals

for the Second Circuit

APPENDIX

74-1298

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1298

GOLDMAN, SACHS & CO., et al.,

Petitioners,

-against-

HONORABLE DAVID N. EDELSTEIN, U.S.D.J., and
THE FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK,

Respondents.

RESPONDENT FRANKLIN'S APPENDIX

Contents

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK, : 71 Civ. 882(DNE)

Plaintiff, : ORDER TO SHOW CAUSE

-against- :

GUSTAVE L. LEVY, et al., :

Defendants. :

- x

Upon the annexed affidavit of William Piel, Jr., sworn to February 27, 1974, defendants' statement pursuant to General Rule 9(g), and defendants' memorandum of law submitted in support of their application, and good cause appearing therefore; it is hereby

ORDERED that plaintiff show cause before this Court at 9 A. M. on ~~February~~ March 4, 1974 in Room 10 of this Courthouse, why an order should not be entered ~~dismissing this action for lack of subject matter jurisdiction or~~ staying this action pending the trial and decision in Welch Foods, Inc., et al. v. Goldman, Sachs & Co., 70 Civ. 4811(DNE); and, should the motion be denied ~~on both grounds~~, why an order should not be entered certifying the issues raised by said motion as involving a controlling issues of law which should be reviewed pursuant to 28 U.S.C. §1292(b); and it is further

ORDERED that this order and the documents upon which it is based shall be personally served upon counsel for plaintiff

by 5 P. M. on February 28, 1974.

Dated: New York, New York
February , 1974

Chief Judge
U.S.D.C.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK, Plaintiff, -against- GUSTAVE L. LEVY, et al., Defendants.	71 Civ. 882(DNE) AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM PIEL, JR., being duly sworn, deposes and says:

I am a member of the Bar of this Court and of the firm of Sullivan & Cromwell, attorneys for defendants. I submit this affidavit in support of defendants' application by order to show cause for a dismissal of this action, a stay of this action if dismissal is not granted, and if both applications are denied, for certification of the issues raised herein for prompt disposition by the Court of Appeals.

The motion to dismiss is based upon uncontroverted facts and, although made as a motion to dismiss for lack of subject matter jurisdiction, we attach hereto a statement pursuant to General Rule 9(g) as if this were a motion for summary judgment.

With respect to the motion for a stay, the following basic facts are matters of record: This action was

commenced on March 1, 1971, four months after the commencement of Welch Foods, Inc., et al. v. Goldman, Sachs & Co., 70 Civ. 4811, after substantial discovery had already taken place in the Welch case, and when it was already apparent that the Welch case would be the most representative "bellwether" action of the many cases which had been filed and which defendants anticipated would soon be filed.

Both the Welch case and this case progressed through discovery coordinated under Docket No. MDL-56A; both this case and the Welch case adhered to the identical schedule for the preparation and submission of proposed final pretrial orders; and any difficulties which the Court has encountered with respect to the proposed final pretrial order in Welch is also present in this case. In fact, it is quite apparent that counsel for plaintiff in Franklin substantially followed the plaintiffs' proposed order in Welch, even to the point of having the same typographical errors.

The two cases are pending at the same stage of preparedness, before the same Judge, and as we set forth in the accompanying memorandum of law, no justification exists for trying this case in preference to Welch.

This application is made by order to show cause rather than by motion in order to obtain a prompt resolution of the issues and, if necessary, prompt appellate review of these issues prior to the scheduled commencement of trial on March 4. No prior application for this or similar

Statement Pursuant to Rule 9(g)
of the General Rules for the
Southern District of New York

Pursuant to Rule 9(g) of the General Rules of the Southern District of New York, defendants Goldman, Sachs & Co. and its general partners ("Goldman, Sachs") submit a statement of the material facts as to which there is no dispute necessary for a determination of the motion submitted herewith. Although the motion made is procedurally one under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the factual matters hereinafter listed are necessary to a determination of the motion in question and are facts as to which there is no genuine issue to be tried.

1. On March 16, 1970 Franklin Savings Bank purchased an unsecured promissory note of the Penn Central Transportation Company maturing June 25, 1970 at a rate of 8-1/2% interest and in the face amount of $500,000. The offer and sale of said note was arranged during a telephone conversation between Harry H. Bock, President of Franklin Savings Bank in New York City, and Robert H. Kaufman, a commercial paper salesman employed in the New York City office of Goldman, Sachs.

2. Subsequent to the telephone conversation described in paragraph 1 above, Goldman, Sachs delivered to Chemical Bank New York Trust Co., in New York City, as agent for Franklin Savings Bank, the note ordered by Bock. Simultaneous with said delivery, Goldman, Sachs was paid by internal bank transfer, in federal funds, the full amount due under the sale agreement between Bock and Kaufman.

3. The note having been delivered and full payment having been received, the transaction was in all respects complete.

4. No use was made of the United States mails at or prior to the completion of the sale.

Dated: New York, New York
February 27, 1974

SULLIVAN & CROMWELL

By_____
William Piel, Jr.
(A Member of the Firm)
Attorneys for Defendants,
48 Wall Street,
New York, New York 10005.
(212) 952-8100

relief has been made to this Court.

_____

Sworn to before me
this 27th day of February, 1974.

_____
Notary Public

71 CIVIL ACTION NO. 882(DNE)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

THE FRANKLIN SAVINGS BANK
IN THE CITY OF NEW YORK,

Plaintiff,

-against-

GUSTAVE L. LEVY, et al.,

Defendants.

ORDER TO SHOW CAUSE,
AFFIDAVIT and 9(g)
STATEMENT

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
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ATTORNEYS FOR
Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

THE FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK, : 71 Civ. 882(DNE)

Plaintiff, :

-against- :

GUSTAVE L. LEVY, et al., :

Defendants. :

- x

B

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, TO STAY PROCEEDINGS PENDING TRIAL OF A RELATED JURY CASE; AND, IF THE MOTION IS DENIED, FOR CERTIFICATION TO THE COURT OF APPEALS

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WILLIAM PIEL, JR.,
MICHAEL M. MANEY,
PHILIP L. GRAHAM, JR.,
ALAN M. REINKE,

Of Counsel.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, TO STAY PROCEEDINGS PENDING TRIAL OF A RELATED JURY CASE; AND, IF THE MOTION IS DENIED, FOR CERTIFICATION TO THE COURT OF APPEALS

This memorandum is submitted by defendants, Goldman, Sachs & Co. and the general partners thereof ("Goldman, Sachs") in support of this motion to dismiss the suit brought by Franklin Savings Bank for lack of subject matter jurisdiction. In the alternative, Goldman, Sachs seeks a stay of the trial of the Franklin case pending trial of Welch Foods, Inc. v. Goldman, Sachs & Co., a related jury case containing common issues of fact. The jury case was brought four months earlier than the Franklin case. Both cases progressed through pre-trial discovery as part of a consolidated proceeding and both have been "pre-trialed" in tandem on identical schedules.

Should both applications be denied, Goldman, Sachs requests the Court to certify both issues to the Court of Appeals under 28 U.S.C. § 1292(b), as they both involve controlling issues of law.

With respect to subject matter jurisdiction, Goldman, Sachs contends that there is no jurisdiction under the Securities Act of 1933 because the commercial paper note

in question was not purchased in interstate commerce as required by Sections 12(2) and 17(a) of that Act, the only sections under which plaintiff claims. Goldman, Sachs further contends that there is no subject matter jurisdiction under the Securities Exchange Act of 1934 because the commercial paper in question does not meet the definition of a "security" contained in Section 3(a)(10) of that Act, and is therefore not a security for purposes of Section 10(b) or Rule 10b-5 thereunder. Because plaintiff has made no federal claims except under Sections 12(2) and 17(a) of the 1933 Act and 10(b) of the 1934 Act, there is no federal jurisdiction and the remaining state law counts should be dismissed for lack of pendent jurisdiction.

In the alternative, Goldman, Sachs submits that this non-jury case should be stayed pending trial of the related jury case having numerous factual issues in common with Franklin.

Factual Background

Goldman, Sachs normally buys commercial paper, as principal, from issuing corporations and sells it, as principal, to investors desiring to purchase short term money instruments.

Because very large sums are involved in virtually all transactions in this market and because investments are for comparatively short periods of time, it has been the traditional

mode of operation that money change hands on the day that a sale is made.*

The sale of Penn Central Commercial paper to Franklin Savings Bank on March 16, 1970 is typical of sales by Goldman, Sachs. The undisputed facts** show that Harry H. Bock, president of Franklin Savings Bank, called a Goldman, Sachs salesman, Robert H. Kaufman, on March 16, 1970 to inquire about available commercial paper for purchase that day. In a telephone conversation with Kaufman, Bock ordered $500,000 face amount of Penn Central Transportation Company commercial paper due June 26, 1970 at an annualized interest rate of 8 1/2%. Although the precise time that Bock called cannot be fixed, shortly after the order Kaufman filled out a Goldman, Sachs "sales ticket" which is a document used to notify the "back office" or Note and Discount Department within the Commercial Paper Department of the sale. In accordance with Goldman, Sachs' usual practice, shortly after that ticket was filled out it was time-stamped. The time stamp on the Kaufman ticket is 11:06 a.m.

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*On an average transaction (which amounts to approximately one million dollars) the loss of interest by not consummating a sale until the day after it was arranged would be $250 on a 9% note.

**Based upon the uncontradicted deposition testimony of Messrs. Bock and Kaufman, and proposed trial exhibits as to which no objection has been interposed.

In accordance with Goldman, Sachs' usual procedures, this sales ticket was transmitted to the Note and Discount Department which arranged for delivery of the note. The note was then purchased by Goldman, Sachs from Penn Central, a matter arranged by immediate transfer of Goldman, Sachs funds at Morgan Guaranty Trust Company in New York City to a Penn Central account, and delivery of the note by Morgan Guaranty to Goldman, Sachs where it was authenticated. The note, now owned by Goldman, Sachs, was then delivered to the bank designated by the investor where it would be presented against payment of "Federal Funds."*

In tne case of the Franklin Savings note on March 16, 1970, the actual note was delivered to Chemical Bank for the account of Savings Bank Trust Company. The testimony of Mr. Bock indicates that Franklin Savings Bank had an account at Savings Bank Trust Company and that this was the normal mode of delivery of notes ordered by him from Goldman, Sachs or other dealers. (Bock Tr. 31) As indicated by Franklin

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*Federal funds, as the term is used in the commercial paper market, refers to United States dollars available for same day settlement. It is to be contrasted to clearing house funds, such as a check, which may require a day or more before an actual transfer of cash takes place.

Savings Bank's own order form (defendant G,S Exhibit FSB 8 for identification) the note was paid for by federal funds. That exhibit also indicates that the settlement date, as well as the transaction date, was March 16, 1970.

When the Penn Central Transportation Company note was delivered by messenger to the agent of Franklin Savings Bank and payment was made in federal funds, the sale was complete. Unlike a typical equities securities transaction where settlement occurs five business days subsequent to the initial order, there is no lag in the sale of commercial paper. In the typical case, of which Franklin Savings Bank is an excellent example, delivery and payment are simultaneous and nothing remains to be completed in that transaction.

Subsequent to the transaction, and solely as a courtesy, Goldman, Sachs sends to each customer which has purchased commercial paper a written statement summarizing the terms of the sale. By force of habit carried over from the equity securities market, this record mailed to the customer is often referred to by the misnomer "confirmation" which is a document used to comply with the statute of frauds. The document is not, however, a confirmation as

that term is used in the equity securities market. This interpretation is confirmed by an examination of the applicable statute of frauds, Section 8-319 of the Uniform Commercial Code, the statute governing securities transactions. A securities transaction meeting the requirements of any subdivision of 8-319 is complete and enforceable. Subdivision (b) provides that the transaction may be completed by delivery and payment. No written record is necessary as a memorandum to enforce that sale. Section 8-319(c), requiring a written memorandum in order to enforce a sale contract not yet executed, is not relevant at all to commercial paper.

It is apparent, then, from this brief summary of the facts surrounding the sale of Penn Central commercial paper to Franklin Savings Bank, that the United States mails were not employed at any time prior to the completion of the transaction. There is no disagreement among the parties that a telephone call was an essential part of the sale. As indicated hereafter, however, the mere use of the telephone to make an intrastate communication is not a sufficient basis for jurisdiction at least under the Securities Act of 1933.

I. Plaintiff Fails to Establish the Jurisdictional Basis Necessary for a Claim Under the Securities Act of 1933

The purpose of the Securities Act of 1933, as stated by the Congress, is "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce ..." Preamble to Public Law No. 22-73rd Congress. Both sections 12(2) and 17(a) of the Act require that the claim arise from the "use of any means or instruments of transportation or communication in interstate commerce or of the mails ...." 15 U.S.C. §§ 77l and 77q.

Although one generally assumes that an intrastate telephone call would be sufficient basis for jurisdiction under the securities laws, this assumption is solely attributable to a number of cases which have been decided under § 10(b) of the Securities Exchange Act of 1934. 15 U.S.C. § 78j(b). But there is an important and crucial distinction between the two Acts regarding the use of jurisdictional means. The 1933 Act, §§ 12(2) and 17(a), as noted previously, requires a "communication in interstate commerce" (emphasis added). The 1934 Act, § 10(b), on the other hand, requires only the use of an "instrumentality of interstate commerce" (emphasis added). The fact that the two acts are

markedly different in many respects has often been observed. Fratt v. Robinson, 203 F.2d 627, 634 (9th Cir. 1953). Although speaking of a different statute, the United States Supreme Court has noted that

> "[i]n making the alterations in the phraseology of the similar section of the earlier act the Congress must have had some purpose. We cannot conclude that the change in wording ... was inadvertent." Weiss v. United States, 308 U.S. 321 (1939) (§ 605 of the Communications Act of 1934).

One leading case in this area has noted that "[d]espite the similarity there is a crucial omission from [the Securities Exchange Act] § 10(b) of the [Securities Act, §§ 12 and 17,] requirement that there be a communication in interstate commerce; the requirement of § 10(b) is 'by use of any means or instrumentality of interstate commerce.'" Myzel v. Fields, 386 F.2d 718, 727 n.2 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968) (emphasis in original). The Myzel court held that an intrastate telephone call was covered by § 10(b) as it was an instrumentality of interstate commerce. 386 F.2d, at 727.

Similarly, Judge Bauman in this District recently rejected a motion to dismiss an action under § 10(b) where the only use of the jurisdictional means was an intrastate telephone call. Judge Bauman pointed out the difference between the 1933 and the 1934 Acts, saying "that in § 10(b)

'instrumentality' is modified by the phrase 'of interstate commerce', not 'in interstate commerce', ..." Heyman v. Heyman, 356 F. Supp. 958, 969 (S.D.N.Y. 1973) (emphasis in original). See also: Murphy v. Cady, 30 F. Supp. 466, 469 (D. Me. 1939) aff'd sub nom Cady v. Murphy, 113 F.2d 988 (1st Cir.), cert. denied, 311 U.S. 705 (1940); and Johns Hopkins University v. Hutton, 297 F. Supp. 1165, 1220 (D. Md. 1968), aff'd in part on other grds, 422 F.2d 1124 (4th Cir. 1970), pet. for cert. pending, No. 73-1249.

Because there are very few Securities Act cases directly on this point, it may be helpful to look at cases under 18 U.S.C. § 1952 which makes unlawful the use of "any facility in interstate or foreign commerce, ..., with intent to" carry on any of the activities listed in subsection (b). Under that statute, Judge Metzner recently held that the words "in interstate or foreign commerce" were intended to cover telephone calls

> "... made only in interstate or foreign commerce [and not purely intrastate telephone calls]. This conclusion is buttressed by the cases discussing the Securities Act of 1933 [citation] and the Securities Exchange Act of 1934 [citation]. These statutes have as one of their objects the prevention of schemes to defraud the investing public. The 1933 Act, in § 17(a) [and § 12(2)], ... speaks of 'the use of any means or instruments of transportation or communication in interstate commerce.' This has been held to mean that the communication itself must be interstate. See Rosen v. Albern Color Research, Inc., 218 F. Supp. 473 (E.D. Pa. 1963). On the other

> hand, § 10 of the 1934 Act [citation] speaks of 'the use of any means or instrumentality of interstate commerce.' It has been held that under this section intrastate use of the facility is all that is required. [citing Myzel v. Fields, supra.]". United States v. De Sapio, 299 F. Supp. 436, 448 (S.D.N.Y. 1969) (adhered to on reargument). (emphasis in original).

Accord; United States v. Hanon, 428 F.2d 101 (8th Cir. 1970), cert. denied, 402 U.S. 952 (1971).

The case of Rosen v. Albern Color Research, Inc., 218 F. Supp. 473 (E.D. Pa. 1963), although an action under Section 10(b) of the Securities Exchange Act, noted that an intrastate telephone call would not be within the scope of the Securities Act, since "[t]he plain meaning of the language of the [Securities Act] is the use in interstate commerce of the particular means or instrument of transportation or communication." 218 F. Supp., at 476 (emphasis in original). See also Northern Trust Co. v. Essaness Theatres Corp., 103 F. Supp. 954, 964 (N.D. Ill. 1952).

Thus it is evident that plaintiff, having only a single purely intrastate telephone call upon which to base its claim to the jurisdiction of this Court, fails to show that there has been the required "communication in interstate commerce," and its claims under the Securities

Act must be dismissed.

It should also be noted, although the Court need not reach this point, that the better reasoned and more recent cases have held that an intrastate telephone call is not sufficient basis for jurisdiction under the Securities Exchange Act of 1934, § 10(b).

The Ninth Circuit has recently held that "there was no use of 'an instrumentality of interstate commerce' within the contemplation of the statute by reason of two local telephone calls . . ." Burke v. Triple A Machine Shop, Inc., 438 F.2d 978, 979 (9th Cir. 1971). Arber v. Essex Wire Corporation, 342 F. Supp. 1162, 1163 (N.D. Ohio 1971) ("purely intrastate telephone calls are insufficient to establish jurisdiction under [§ 10(b)]").

As the Court in the Rosen case noted, the telephone is an instrument of both interstate and intrastate commerce. When the telephone is used purely intrastate, it is not an instrumentality of interstate commerce.

> "Neither the fact that the telephone was susceptible to use for interstate communication, nor the fact that the wires carrying the conversations were, in part, used for interstate calls on other occasions has, in our view, any controlling significance." Rosen v. Albern Color Research, Inc., 218 F. Supp. 473, 476 (E.D. Pa. 1963).

II. No Claim Can Be Asserted in This Action Under the Securities Exchange Act of 1934

The commercial paper involved in this action consists of notes having a maturity at the time of issuance not exceeding nine months. Thus by statutory definition the commercial paper involved is not a "security" as defined in Section 3(a)(10) of the Securities Exchange Act of 1934.*

Two judicial decisions, however, have unfortunately and incredibly gone beyond the plain and unambiguous language of the statute and engrafted upon the exclusion under Section 3(a)(10) the further requirement that the note qualify for exemption from registration under the Securities Act of 1933. In Sanders v. John Nuveen & Co., 463 F.2d 1075 (7th Cir.), cert. denied, 409 U.S. 1009 (1972), and Zeller v. Bogue Elec. Mfg. Corp., 476 F.2d 795 (2d Cir. 1973), the courts held that notes excluded under Section 3(a)(10) of the Exchange Act must be limited to those notes which are exempt from registration under Section 3 of the Securities Act

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* Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10), provides in pertinent part:

> "The term 'security' means any note, ... but shall not include currency or any note ... which has a maturity at the time of issuance of not exceeding 9 months ...."

of 1933. In those cases the notes, while covered by the statutory language of Section 3(a)(10), apparently did not meet all of the requirements of Section 3(a)(3) of the Securities Act, and were therefore treated as securities subject to the Exchange Act.

The holdings in those two cases can be summarized in the following statement by Professor Loss, quoted with approval in Sanders v. Nuveen:

> "Short-term notes of the type which are exempted from registration under the Securities Act by § 3(a)(3) are excluded from the definition of 'security' in the Exchange Act". 2 Loss, Securities Regulation 796 (1961).

Plaintiff here obviously will attempt to bring Penn Central's commercial paper within the reasoning of those cases by relying on questions posed during discovery on the issue of whether the proceeds from the sales of Penn Central commercial paper were used for current transactions, a requirement for exemption under Section 3(a)(3) of the Securities Act. But in using the test of Section 3(a)(3) plaintiff completely misses the mark. The commercial paper of Penn Central was exempt from registration under the Securities Act pursuant to the provisions of Section 3(a)(6) of that Act, which exempts from registration securities of a common carrier which are authorized for issuance by the

Interstate Commerce Commission. The ICC reviewed and authorized the issuance of commercial paper by Penn Central, and thus the paper was clearly exempt from registration under the Securities Act.

To the extent that the decisions construing Section 3(a)(10) of the Exchange Act impose a requirement beyond that contained in the words of the statute itself, that requirement is based upon the view that the notes in question are not subject to the antifraud provisions of the Exchange Act if they qualify for exemption from registration under the Securities Act; if that test is met, commercial paper having a maturity of less than 9 months is excluded entirely from the operation of the Exchange Act.

The view that Penn Central's commercial paper is not subject to actions under the Exchange Act is supported by the Securities and Exchange Commission itself, the very agency the views of which were given such weight by the courts in Sanders and Zeller. In his letter transmitting the Staff Report on the Financial Collapse of the Penn Central to the Congress, Chairman William J. Casey of the SEC makes that very point:

> "The antifraud provisions of the 1933 Act apply to the sale of securities exempt from regulation, although commercial paper having a maturity up to 270 days is not a security for purpose of the Exchange Act of 1934". SEC Staff Report, at viii.

Accordingly, the complaint in this action, to the extent that it asserts a claim under Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder, should be dismissed because no "security" is involved in this case as defined in that Act. Because plaintiff also has no claim under the Securities Act, no Federal claim at all exists in this case, and the action should therefore be dismissed in its entirety. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Kavit v. A.L. Stamm & Co., 2d. Cir. January 22, 1974.

III. THIS ACTION SHOULD BE STAYED PENDING TRIAL OF THE WELCH CASE

As the Piel Affidavit indicates, the Welch case--in which Goldman, Sachs' right to trial by jury has been preserved--was brought some months before Franklin. Discovery had commenced in Welch during the interim period, and Welch had begun to emerge as the logical "bellwether" case for trial. After consolidation by the Judicial Panel, pretrial discovery in all of the Penn Central cases including Welch and Franklin proceeded simultaneously as if they constituted a single case. Subsequent to remand, Franklin and Welch were "pretrialed" on identical schedules. Many of the factual issues in Franklin are common to it and Welch.

In these circumstances, the order in which these cases are tried must -- in accordance with the mandate of the Seventh Amendment to the United States Constitution -- be such as to preserve the right to trial by jury in Welch.

A series of decisions, many in the United States Supreme Court, have indicated in recent years that the Seventh Amendment right to a trial by jury takes precedence over administrative convenience and the preferences of the court in determining whether a factual issue shall be tried to the judge or to the jury. Beginning with the case of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), these decisions have held that in a variety of circumstances where jury and non-jury matters have arisen in the same case, the common issues of fact must be tried to the jury. Although the matter before this Court involves two cases, the right to trial by jury in one of them is not any the less important by reason of the fact that the threat which would preclude a full jury trial arises from a related action rather than another segment of the same case. See Rachal v. Hill, 435 F.2d 59, (5th Cir. 1970).

In Beacon Theatres plaintiff brought an action for a declaratory judgment and equitable relief to which the defendant responded with a counterclaim for treble damages under the antitrust laws. The Court held that the factual issues common to the claim for equitable relief and the claim for treble damages must be tried to a jury. Having held that a jury was required in the case before it, the Court went on to

note that as a matter of Constitutional policy issues of fact common to jury and non-jury claims should be tried to a jury except in the most extraordinary circumstances.

> "Since the right to jury trial is a constitutional one . . . while no similar requirements protect trials by the court, that discretion [to try the non-jury claim first] is very narrowly limited and must wherever possible be exercised to preserve the jury trial . . . ."
>
> "This long standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the federal rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (359 U.S. at 510-11)

See also Dairy Queen Inc. v. Wood, 369 U.S. 469 (1962).

As indicated, the matter before the Court does not involve the trial of legal and equitable issues. It does, however, involve the question of which, as between a jury and a non-jury case -- brought at approximately the same time, having proceeded through discovery together and pre-trialed in lock-step -- should be tried first. The United States Supreme Court has not reached this precise issue, but several recent cases make it clear that the proper solution is for the jury case to be tried first.

In Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971), an earlier injunctive action brought by the Securities and Exchange Commission against the defendants was pleaded as collateral estoppel by private plaintiffs subsequently asserting a claim against the same defendants for money damages. The Court held that although precisely the same factual

questions were at issue, although the matter had been tried fully in the SEC proceeding and although there had been findings of fact which were pertinent to the subsequent case, no collateral estoppel effect could be recognized because such recognition would deny defendants their right to a jury trial. The court held

> "It is clear that had it not been for the prior adverse determination of the issue of liability by the district court sitting without a jury in the SEC injunction proceeding, the appellants would have been, without question, entitled to a trial by jury as a matter of right under the 7th Amendment . . . . The central question thus presented is whether a litigant can lose his constitutional right to a trial by jury by estoppel when the issue to be decided has been adjudicated adversely to him in a prior proceeding at which there was no right to a trial by jury and his present adversary was not a party." At 63.

The Court recognized that there were numerous opinions in the Beacon Theater-Dairy Queen line recognizing that a legal claim should be given preference to an equitable one. Acknowledging the situation before it was somewhat different because two separate actions were involved, the Court nevertheless concluded

> "In light of the great respect afforded in Beacon Theatres, supra, and its progeny, for a litigant's right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anamalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the securities laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action." At 64.

The court concluded that if the plaintiff in the second suit had been a party to the earlier suit, a jury trial would have

been allowed and "it hardly makes sense that [the defendant] can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action." As a result, the Court in Rachal held that the doctrine of collateral estoppel was not applicable.

The same reasoning was applied by Judge Bonsal in Cannon v. Texas Gulf Sulphur Company, 323 F. Supp. 990 (S.D.N.Y. 1971), in which plaintiffs again asserted collateral estoppel based on a prior proceeding. Unlike Rachal, it appears that the defendants in Cannon could have requested a jury in the prior proceeding just as Goldman, Sachs could have requested a jury in the Franklin case had it chosen to do so. Judge Bonsal held that this fact was irrelevant. A party is not required to request a jury in one case in order to preserve its right to a jury in connection with a similar suit brought by other plaintiffs.

> "Plaintiffs and plaintiff-intervenors have demanded a trial by jury on all issues in accordance with Rule 38, F.R. Civ. P., and defendants are entitled to rely on this demand . . . The parties to the SEC action waived the jury as to any legal claims that were there involved. It does not follow that they would have waived a jury had these plaintiffs and plaintiff-intervenors also been parties. Therefore in the light of Rachal, defendants are not collaterally estopped by the findings in the SEC action. (Emphasis supplied) At 993-94.

The clear holding of Cannon is that the determination not to request a jury in one case cannot waive the right to a jury

trial in a separate case, albeit involving the same facts, in which some other person is the plaintiff.

Based on the decisions in Cannon and Rachal, Goldman, Sachs believed -- until recently -- that its right to a jury trial, in cases where a jury had been demanded, would not be jeopardized by the earlier trial of a non-jury case. This situation, however, has been altered by the recent Second Circuit decision in Crane Co. v. American Standard, Inc.* In that case, after an equitable action was tried to the court and a judgment of liability was entered, plaintiffs asserted a claim for damages. Defendants objected that they were entitled to a jury trial on the issues relevant not only to damages but to liability in a case which now raised legal rather than equitable issues. The Second Circuit denied the right to a jury trial in these circumstances, in essence holding that the request for a jury trial was not timely. The case indicated that where a non-jury matter, in the ordinary course of events, proceeds to judgment, plaintiff has no complaint when a later legal issue arises. In such circumstances, it appears that the collateral estoppel effect of a prior judgment affects the opportunity for a later jury trial on the issue of liability.

Given the learning of Crane, it appears that if Goldman, Sachs does not assert its right to a jury trial now,

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* Decided December 19, 1973.

and does not exhaust its remedies in an effort to obtain such a jury trial, such right may be lost forever.

> ". . . Standard's error lies in confusing cases of two very different sorts: those where the question of the proper order for trying jury and non-jury issues arises before any trial has occurred, as in Beacon and Dairy Queen, or where an issue properly triable to a jury has been tried by a judge over a party's seasonable protest, as in Heyman v. Kline, 456 F.2d 123 (2d Cir., cert. denied, 409 U.S. 847 (1972)); and those where the action has been properly tried to a judge and damages enter the case only because defendant's acts subsequent to the judgment require retrospective relief, possibly including damages, rather than the prospective relief initially sought." Slip op., at 897.

The import of Judge Friendly's decision for this case may be seen by examining the "able note" in the Harvard Law Review which is cited with approval in the opinion. Shapiro and Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv. L. Rev. 442, 445-48. (Cited in slip opinion at 900.) Like Judge Friendly, the authors drew a sharp distinction between cases such as Beacon Theatres which deal with the order in which issues will be tried and Rachal which deals with the collateral estoppel effects of a non-jury case which has gone to trial. Judge Friendly and the authors of the note stress that the historical mandate of the Seventh Amendment has been interpreted to affect the order of trial, and, that its

use to bar the invocation of collateral estoppel, as was done in Rachal, is novel and perhaps improper. We do not, however, read Crane as criticizing the holding of Rachal and Cannon that the existence of a non-jury suit cannot waive the right to a jury in another case. All Crane says is that such a right must be timely asserted.

The issue before this Court is not one of collateral estoppel but one of the priority of a jury trial. It is, therefore, squarely within the area governed by Beacon Theatres. Like that case, the issue is raised in advance at a time when the jury case can be tried first. Crane clearly indicates that now is the proper time to assert this right and that failure to assert it and pursue it may bar any later claim.

The Issues Presented By This Motion Should Be Certified For Prompt Appellate Review

The issue of the subject matter jurisdiction of this Court is clearly one which poses a controlling question of law. If defendants are correct on this point, there should be no trial at all in this case. Unlike the Welch case, in which the issue of subject matter jurisdiction would only eliminate one of four plaintiffs, and which therefore

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could be appropriately decided during trial, the result of proceeding with the trial in this case, should defendants later be sustained on the jurisdictional issue, would result in the very waste of federal judicial effort in trying state law claims which was the subject of criticism by the Court of Appeals in Kavit v. A.L. Stamm & Co., 2d. Cir., January 22, 1974.

Defendants' second point, that the order of trial between two cases, one jury and one non-jury, requires that the first case tried be a jury trial, involves a substantial question of constitutional dimension. The defendants' right under the Seventh Amendment would be an appropriate issue for review by mandamus, and we are confident that this Court would welcome appellate review by the more appropriate vehicle of certification under 28 U.S.C. § 1292(b).

For the reasons stated in this memorandum, defendants' motion should be granted and this case dismissed or, in the alternative, stayed pending trial of Welch Foods, Inc. v. Goldman, Sachs & Co.

Dated: New York, New York
February 28, 1974

Respectfully submitted,

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WILLIAM PIEL, JR.,
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Of Counsel.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK, Plaintiff, -against- GUSTAVE L. LEVY, et al., individually and doing business under the firm name and style of GOLDMAN, SACHS & CO., Defendants.	ANSWERING AFFIDAVIT 71 Civ. 882-DNE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT S. STITT, being duly sworn, deposes that he is a member of the firm of Thacher, Proffitt & Wood, attorneys for the plaintiff, Franklin Savings Bank of New York ("Franklin"), and that he is in charge of the conduct of this litigation in its behalf.

Deponent submits this affidavit and an accompanying memorandum of law in opposition to the defendants' application of February 28 for an order "staying this action pending the trial and decision in Welch Foods, Inc. et al. v. Goldman, Sachs & Co., 70 Civ. 4811 (DNE...) and, should the defendants' motion be denied, for certification for appellate review pursuant to 28 U.S.C. §1292(b)...." The defendants' application was made on the eve of trial. As a result of their application, the trial is now scheduled to commence on March 11.

Deponent respectfully submits that the defendants' application for a stay should be denied for three basic reasons:

1. The defendants had repeated opportunities to demand a jury trial in Franklin but did not do so. There has been no claim or showing that the defendants' waivers were due to oversight or neglect. By failing to demand a jury trial in Franklin, the defendants assumed the risk of any precedent or estoppel which might flow from an adverse decision by the court in Franklin.

2. The question of trial sequence is strictly a matter for the exercise of the court's discretion in the control of its dockets, calendars, commitments and schedules. As demonstrated in this affidavit, the defendants' own conduct was a significant factor in the court's decision to try Franklin first.

3. The defendants have mentioned no facts and cited no authority showing that they are entitled to a stay.

Deponent also submits that in the event the defendants' application for a stay is denied, the defendants' alternative request for certification should be denied because (i) the motion does not involve any "controlling issue of law" and (ii) certification would delay rather than advance the ultimate determination of this litigation.

Pleadings

Franklin's suit against Goldman, Sachs and its forty odd partners was commenced on March 1, 1971. Franklin's complaint contained no demand for a jury trial. Goldman, Sachs and its partners, all of whom were eventually served throughout the country, filed some six separate answers to the complaint bearing dates ranging between April 7 and December 10, 1971. No jury demand was made in any of these answers or in any other document known to deponent. The defendants' time to do so has, of course, long since expired. Rule 38(b)(d), Federal Rules of Civil Procedure)

Franklin was commenced after Welch, a case in which the plaintiffs demanded a jury trial. Accordingly, as of March 1, 1971 the defendants were aware of the necessity of

demanding a jury trial if their alleged right to have a jury trial of issues of fact common to all of the Penn Central cases was to be protected. Deponent is informed that the defendants demanded jury trials in none of these cases, including Greenwood Mills, in which, like Franklin, the plaintiff made no such demand. (Pretrial hearing, December 18, 1973 p. 42)

Pretrial Discovery

Franklin, along with some thirty other Penn Central commercial paper cases (MDL-56A) participated in the consolidated pretrial discovery proceedings. Approximately fifteen of these cases, including Franklin, have been assigned to the Chief Judge. After the conclusion of this discovery, the cases so assigned were called for a pretrial conference on December 18, 1973. Deponent submits that the transcripts of this conference and the following conference on February 26, 1974 confirm that the court's decision to try Franklin first represents a sound exercise of judicial discretion for two reasons: (i) the defendants were given ample notice that Franklin might be the first case to be tried and (ii) the defendants' own conduct was instrumental in that decision.

Conference of December 18, 1973

At the December 18 conference counsel for defendants brought up the possibility of trying a "bellwether case" which might enable other cases to be settled rather than tried. (14) Defendants' counsel suggested that pretrial orders be prepared in Welch and one or two "understudy cases" which could, if the need arose, "be brought up quickly." (15) The court listed the criteria for pretrial orders which included identification and description of all

documents which the parties intended to use. (17-19) The court stated that it still did not have any clear view of the defendants' wishes in regard to "jury or non-jury" and recalled that at one of the previous conferences, counsel for the plaintiffs in Welch had indicated a willingness to waive a jury, but that the defendants were "not quite sure" and had not made up their minds. (19) Defendants' counsel responded by stating that the defendants would "probably" require a jury. (19)

Deponent then pointed out that in Franklin no jury demand had been made by the plaintiff or the defendants and that it was deponent's intention to try Franklin without a jury. (19-20) The court responded by stating that it was "fairly clear" that the time for demanding a jury in cases such as Franklin had expired and that "unless good cause is shown" it would try those cases non-jury. (20)

The court stated its intention to move the Welch case along "efficiently", (23) and expressed a desire for a trial in February. (24-25) At the request of both counsel in Welch, the court set a trial date of March 4, 1974. (26-27) A March 24 date was also discussed. (26) The court stated that a delay until that date might "very well mean" not getting a trial at all. (26-27) Among other things, the court was committed to a trial date of October 7 in the complex IBM case. (25)

Plaintiff's counsel in Welch estimated that with a jury the trial might take several months. (26) (This estimater was later reduced to four to five weeks.) The court, after stressing that if Welch did not go to trial in March, Welch might have to wait "a long time", scheduled January 28

for the first exchange of proposed pretrial orders, February 6 for responses and February 11 for submission of proposed pretrial orders. (30-31) At this point, counsel for Welch pointed out that his case could be tried in a much shorter time, perhaps two weeks, on a non-jury basis. (32) Promptly after this comment, the court expressed interest in hearing about Franklin. (33)

Deponent pointed out that Franklin involved a single purchase on March 16, 1970 as compared with Welch which involved several prior purchases and one subsequent to Franklin's. (33) In response to the court's inquiry, deponent estimated that Franklin could be tried in not more than two weeks. (34) The court raised the question of why Franklin couldn't be the "bellwether case" (33) and then instructed deponent to participate in the pretrial as precisely and fully as if the court had already made its decision that Franklin should be tried first. (33-34) The defendants interposed no objection.

Interval

Between the conferences of December 18, 1973 and February 26, 1974, deponent and his office devoted literally hundreds of hours of lawyers' time (i) reviewing depositions, pleadings, exhibits and other documents, and (ii) preparing pretrial orders and proposed findings of fact and conclusions of law. Much of this effort will have to be repeated at additional expense to Franklin if the trial presently scheduled for March 11 should be further delayed. Franklin Savings Bank, it is respectfully submitted, should not be put to this additional expense.

During the interval, the defendants took steps which practically forced the court into a decision to try

Franklin first. This occurred when the defendants belatedly designated their trial exhibits in Welch as well as Franklin. (Conference February 26, 1968, pp. 23, 26, 31-33, 36-37) Of the four hundred eighty-nine documents designated by the defendants in Welch, an estimated 40% had never previously been seen by Welch's counsel, who had also acted as liaison counsel for plaintiffs in the pretrial discovery proceedings. (31-33) Moreover, these documents were not even made available for examination until February 9, the weekend before the proposed pretrial orders were to be submitted. (31)

The defendants' documents included material relating to the New York Central Railroad dating back long before the merger of February 1, 1968. (26) Many of the later documents were reproductions of newspaper articles. (36-37) As a result, of the six hundred eighty-two documents designated by both sides in Welch, only one hundred ninety-eight (approximately 25%) were not objected to. (15-16)

Conference February 26, 1974

As indicated, the unresolved objections concerning 75% of the six hundred eighty-two documents designated as exhibits in Welch played a major role at the final pretrial hearing on February 26. (15-16, 18, 19, 21, 23, 26-29, 31-33, 36-38) Welch's counsel took the position that the "hoard" of documents belatedly designated and produced by the defendants could obscure and prejudice his jury case. (29, 36) The court stated that to rule on the objections as Welch proceeded to trial before the jury would be most impractical and disorderly. (19-21) To rule on the objections before trial would require, in the court's opinion, two and a half weeks of full time working days. (18, 38)

In response to the court's questions, deponent replied that Franklin was not affected as much as the other parties because there were not as many exhibits involved in Franklin and because there was no jury which could be misled by the defendants' documents. (36-37) Indeed, with regard to the newspaper articles, deponent offered to waive any objection based on authenticity upon receiving a representation that such records had been received by Goldman, Sachs in the usual course of business. (37) (Deponent made a similar offer to defendants' counsel almost two weeks before the conference.)

Deponent stated that the plaintiff Franklin's case would not exceed three or four days. (46) The court stated that it was "very dubious" about the statement that the Franklin case would take "very little time less" than Welch. (46) Indeed, the court indicated that Franklin could very well be tried in the time that it would take for a magistrate to consider the various objections in Welch (presumably the deposition testimony as well as exhibits) and transmit his recommendations. (45-46) Under these circumstances, the court directed that Welch be referred to Magistrate Schreiber (51A) and, on the following morning, notified both sides that the Franklin case would commence trial on Monday, March 1.

During the course of the conference on February 26, the following positions were taken:

1. Deponent stated that Franklin would not consider itself bound by a prior defendants' verdict in Welch (49);

2. Defendants' counsel took the position that a plaintiffs' verdict in Welch would not be binding on the defendants (49);

3. Welch's counsel stated that a decision in Franklin would not resolve any case, certainly not Welch (51); and

4. The court stated that it did not think that any case would resolve any other case except upon a stipulation to abide the event. (51)

There were no statements to the contrary by counsel for at least three other plaintiffs in attendance.

Certification

The asserted ground for certification is that the motion involves a "controlling issue of law" which should be reviewed pursuant to 28 U.S.C. §1292(b). This subject will be discussed in plaintiff's accompanying memorandum of law. Deponent would call attention to the fact that the defendants' General Rule 9(g) statement makes no mention (i) of the defendants' use of the mails to send Franklin a letter confirming the sale of March 16 and to sending Franklin a misleading green sheet not only on March 16, but also on March 13 (Pretrial order p. 13, Exhibits F-83 and F-84), or (ii) of the additional mailings and use of the telephone which the defendants caused or set in motion by reason of their sale to Franklin. (Pretrial order p. 14, Exhibit F-88)

Moreover, the defendants have made no showing that certification would materially advance the ultimate determination of this litigation. At the conference of February 26, the defendants conceded that proof was required to resolve whether commercial paper was a security under the 1934 Act. (4-5) It is deponent's belief, as the facts recited in this affidavit confirm, that certification would materially delay this litigation and the final determination thereof.

WHEREFORE, for reasons stated in this affidavit and in the accompanying memorandum of law, deponent

respectfully requests that the defendants' application be in all respects denied.

Sworn to before me this
3rd day of March, 1974

Robert S. Stitt
Robert S. Stitt

Albert J. Cardinali

ALBERT J. CARDINALI
Notary Public, State of New York
Qualified in [illegible]
Commission Expires [illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE FRANKLIN SAVINGS BANK IN THE CITY OF NEW YORK,		
Plaintiff,	:	71 Civ. 882-DNE
-against	:	
GUSTAVE L. LEVY, et al., individually and doing business under the firm name and style of GOLDMAN, SACHS & CO.,	:	
Defendants.	:	

PLAINTIFF'S ANSWERING MEMORANDUM

Preliminary Statement

Plaintiff submits this memorandum together with an answering affidavit of Robert S. Stitt, sworn to on March 3, 1974, in opposition to the defendants' motion for (i) a stay of this action pending the trial and decision in Welch Foods or alternatively (ii) certification for appellate purposes under 28 U.S.C. §1292(b). The facts are set forth in the answering affidavit.

Point I

No Stay Should Be Granted

There has been no claim and no showing that the failure of each of the defendants to demand a jury trial in Franklin was attributable to oversight or neglect. Accordingly, the defendants are deemed to have deliberately waived trial by jury. Rule 38(b)(d), Federal Rules of Civil Procedure.

The defendants' alleged reliance upon Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) and Rachal v. Hill, 435 F. 2d 59 (5th Cir. 1970), cert. den., 403 U.S. 904, was misplaced. Beacon and Dairy Queen each involved defendants who had made timely demands for jury trials. Rachal involved a defendant who was not entitled to demand a jury trial in a prior SEC injunction proceeding. In Canon v. Texas Gulf Sulphur Company, 323 F. Supp. 990 (S.D.N.Y. 1971) the plaintiffs, unlike the plaintiff in Franklin, had demanded jury trials and the defendants were therefore held under Rule 38 entitled to rely on their demands.

The facts of these cases simply will not justify the interpretation now placed upon them by the defendants; namely, that the Seventh Amendment requires that the trial of an action at law in which the defendants deliberately waived their right to a jury trial be stayed in order to prevent possible application of res judicata or collateral estoppel in a subsequent trial with different plaintiffs

but involving common issues of fact and law. Since defendants could not reasonably rely on Rachal and its companion cases, it is irrelevant that Rachal's authority has been questioned in Crane v. American Standard, Inc., (2d Cir. December 19, 1973). Of course, the defendants' apprehensions concerning the preclusive effect of having Franklin tried first without a jury would be rendered moot if they should prevail.

At a pretrial conference held on December 18, 1973, almost three months ago, the court made clear that Franklin could well be the "bellwether" case and set a trial date of March 4. (Answering affidavit pp. 3-5) The defendants were represented at the conference, made no objection at the time and did not raise the question of jury trial precedence until after the Franklin Savings Bank had been put to considerable time and expense in the preparation of its case for trial. (Answering affidavit pp. 5-7) Much of this effort and expense would have to be repeated if the defendants' application were granted. (Answering affidavit p. 5)

At a conference on February 26, the court expressed dissatisfaction with the pretrial condition of Welch, declined to rule on a mass of evidentiary objections and announced its decision to refer Welch to Magistrate Schreiber for completion of pretrial proceedings. (Answering affidavit pp. 5-7) The unsatisfactory pretrial condition of Welch and the court's decision, announced the following day, to try Franklin first

were attributable, at least in part, to the defendants' belated designation and production of trial exhibits. (Answering affidavit pp. 5-7)

Under the foregoing circumstances, there can be no question that the court's decision to try Franklin and refer Welch to Magistrate Schreiber represented a sound exercise of discretion.

Western Geophysical Company of America v. Bolt Associates, Inc.,
440 F. 2d 765, 771-772 (2d Cir. 1971)

An applicant for a stay must make out a clear case. Only in rare circumstances will one litigant be compelled to stand aside in favor of another.

Landis v. North American Co.,
299 U.S. 248, 254, 255 (1936)

Ferguson v. Tabah,
288 F. 2d 665, 672 n. 11 (2d Cir. 1961)

In view of the defendants' intentional waivers of their right to jury trial, this is not one of those circumstances.

Point II

Certification Should Be Denied

As a general proposition, decisions of this Circuit do not favor interlocutory appeals under 28 U.S.C.A. §1292(b), reserving this mechanism only for exceptional situations. Gottesman v. General Motors Corporation, 268 F. 2d 194, 196 (2d Cir. 1959); United States v. Spencer, 473 F. 2d 1008 (2d Cir. 1973) In order to qualify under the statute, the

moving party must demonstrate that there is a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation...." The defendants' papers fail on both counts.

(1) The court's decision to try Franklin first does not present a "controlling question of law" within the meaning of §1292(b) because that decision clearly constituted a proper exercise of discretion in the context of the circumstances described in the answering affidavit and the authorities and analysis set forth under Point I.

Similarly, the jurisdictional questions, if they had any real validity, would have been raised years ago and not on the eve of trial. (February 26 conference, pp. 3, 8-10) In any event, the court has deferred these questions for the trial and the defendants themselves contend that proof will be required in determining whether commercial paper is a "security" under the 1934 Act. (Answering affidavit p. 8) As will be demonstrated in the plaintiff's pretrial memorandum, to be submitted to the court on March 4, the case law is clear that the defendants' use of the mails and telephone, as well as the additional use of these facilities which was caused or set in motion by reason of their sale to Franklin, supports jurisdiction under both Acts.

(2) No showing has been made that an interlocutory appeal would materially advance the ultimate determination of

this litigation. Indeed, such an appeal would only cause further delay. (Answering affidavit pp. 2, 4-8)

The defendants' suggestion, at page 23 of their memorandum, that certification should be granted because appellate review could be had, in any event, by mandamus, is without substance.

Will v. United States,
389 U.S. 90 (1967)

Western Geophysical Company of America v. Bolt Associates, Inc., supra, at pp. 771-772

Conclusion

The defendants' motion should be denied in all respects.

Dated New York, New York
March 3, 1974

Respectfully submitted,

Thacher, Proffitt & Wood

Attorneys for the plaintiff

Robert S. Stitt,
George W. Taliaferro, Jr.,
Of counsel